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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ERNESTO SANCHEZ,

Defendant and Appellant.

D074694

(Super. Ct. No. RIF1501633)

APPEAL from a judgment of the Superior Court of Riverside County, John D. Molloy, Judge. Affirmed as modified with directions.

Robert L.S. Angres, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Julie L. Garland, Assistant Attorney General, Melissa Mandel and Tami Falkenstein Hennick, Deputy Attorneys General, for Plaintiff and Respondent.

After the trial court denied his motion to suppress evidence, Ernesto Sanchez pleaded guilty to possessing more than 20 kilograms of cocaine for sale. (Health & Saf.

Code, §§ 11351, 11370.4, subd. (a)(4).) The court sentenced Sanchez to two years in jail and 15 years of supervised release under various terms and conditions.

On appeal, Sanchez contends that (1) police conducted an unlawful warrantless protective sweep of his residence; (2) his on-scene admission that 10 kilos of cocaine were in his residence is fruit of that illegal search and should be suppressed; (3) absent that admission, there is no probable cause to support the subsequently issued search warrant; and (4) the court erred in placing the burden on him to show that his admission was the result of an unlawful search.

Sanchez also asserts that two conditions of his mandatory supervision should be modified. The first is one prohibiting him from associating with persons possessing controlled substances. He contends that condition is unconstitutionally overbroad because it is not limited to *unlawfully* obtained controlled substances. Second, Sanchez contends that the condition barring him from associating with "gang" members is unconstitutionally vague and should be modified to define "gang" as a criminal street gang under Penal Code<sup>1</sup> section 186.22, subdivisions (e) and (f). The Attorney General does not object to either of these proposed modifications.

As explained *post*, we will modify the judgment regarding these two conditions of mandatory supervision and affirm the judgment as so modified.

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<sup>1</sup> Undesignated statutory references are to the Penal Code.

## FACTUAL AND PROCEDURAL BACKGROUND<sup>2</sup>

### *A. Wiretap and Surveillance*

Police suspected Sanchez was involved in drug trafficking. In June 2013, while working in conjunction with the Drug Enforcement Agency, Sergeant Joshua McAlister submitted an affidavit in support of a wiretap of Sanchez's cellular telephone, which the superior court granted. Based on GPS tracking, police located Sanchez at a residence in Riverside County.

One of the intercepted text messages to Sanchez from the drug courier stated, "I'm calling on behalf of Viejito." Sanchez responded, "Do you have the tires?" "Tires" was code for narcotics. After intercepting this message, police began surveillance of Sanchez's residence. After a further exchange of text messages, Sanchez and the courier met at a nearby restaurant parking lot. Sanchez told the courier that he was driving a GMC truck; the courier replied that he was in a gray Toyota.

While police watched Sanchez's residence, Officer Fred Kittman followed Sanchez to the restaurant. There, he saw Sanchez and the courier engage in a brief conversation, after which they returned to their respective vehicles and drove to Sanchez's residence.

Once there, Sanchez and the courier parked behind a gate, exited their vehicles, and, after standing next to the rear passenger side of the Toyota, both entered the residence. Officer Kittman's view was partially obstructed by a block wall and a wrought

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<sup>2</sup> The facts are taken from the suppression motion hearing.

iron fence. He could see Sanchez and the courier from chest level up. He could not see their hands and, therefore, did not see either remove anything from the Toyota.

After about 15 minutes, the courier left. Police stopped his car a short distance away, but there were no drugs in the vehicle.

*B. Warrantless Entry to Secure the Premises*

From the intercepted phone calls and text messages, police knew that the courier and Sanchez communicated with each other by cell phone. "Fearful" that the courier would warn Sanchez that the police were on his trail, officers who remained at the residence entered to prevent Sanchez (or anyone else inside) from destroying evidence before police could obtain a search warrant.

Police entered the residence without force. Police did not open any containers, did not look through any closets, and did not inspect any property. An officer saw trash bags in the kitchen, but did not open them.

Officer Kittman interviewed Sanchez at the scene. After being Mirandized,<sup>3</sup> Sanchez said he had received a call that "tires"—code for cocaine—were ready. Sanchez told Officer Kittman that the courier in the Toyota delivered 10 kilos, which were now in the kitchen. Sanchez said that he had "often" received cocaine deliveries from "bosses in Mexico."

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<sup>3</sup> *Miranda v. Arizona* (1966) 384 U.S. 436.

### *C. Search Warrant*

Later that evening, Sergeant McAlister wrote a search warrant affidavit.

McAlister's affidavit does *not* contain any of the observations made by officers during the warrantless entry. However, the affidavit does contain Sanchez's admission that the courier "said he was going to come over and drop off 10 kilos" and that the cocaine was in the kitchen.

After obtaining a search warrant late that evening, police found in Sanchez's residence approximately 20 kilograms of cocaine inside a black trash bag in the kitchen, \$15,000 cash, and a .44-caliber revolver. The street value of the cocaine was approximately \$500,000.

### *D. Motion to Suppress*

Asserting there were no exigent circumstances justifying the initial warrantless entry, Sanchez filed a motion to suppress his on-scene admissions and the evidence seized.<sup>4</sup> After conducting an evidentiary hearing, and in a complicated ruling, the trial court denied Sanchez's motion to suppress. Without stating an explanation or rationale, the trial court ruled that the warrantless protective sweep was unlawful. Nevertheless, the court determined that Sanchez's on-scene admission was lawfully included in the search warrant affidavit because (1) police properly Mirandized Sanchez; and (2) Sanchez did not carry his burden of showing that police questioned him *inside* his home during the

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<sup>4</sup> Sanchez's attorney also filed a motion to suppress all wiretap evidence on the grounds that the wiretap was not properly authorized. The court denied that motion and Sanchez does not challenge that ruling on appeal.

unlawful protective sweep, as opposed to a voluntary interrogation outside the residence. Thus, the court found "there was nothing wrong with the [search warrant] affidavit." Alternatively, the court ruled that if Sanchez's admission was excised from the search warrant affidavit, the remainder was too conclusory to support issuing the search warrant, and the motion to suppress would have to be granted.

## DISCUSSION

### I. ISSUES INVOLVING THE MOTION TO SUPPRESS

#### A. *The Standard of Review*

In reviewing suppression issues, we defer to the trial court's factual determinations, but independently assess whether those facts require suppression. (*People v. Weaver* (2001) 26 Cal.4th 876, 924.) We affirm the trial court's ruling if correct under any legal theory. (*People v. Hua* (2008) 158 Cal.App.4th 1027, 1033.) Accordingly, as Sanchez acknowledges, we may affirm the order denying the motion to suppress if the result is correct, even if we disagree with the trial court's reasoning.

#### B. *The Warrantless Protective Sweep Was Lawful*

"[A] police officer who has probable cause to believe a dwelling contains evidence of a crime and has reason to fear imminent destruction of the evidence may enter the dwelling to 'secure' it without first getting a warrant." (*People v. Seaton* (2001) 26 Cal.4th 598, 632.) This rule is particularly apt in drug cases. "[E]fforts to dispose of narcotics and to escape are characteristic behavior of persons engaged in the narcotics traffic." (*United States v. Rubin* (3d Cir. 1973) 474 F.2d 262, 268-269.) "[T]he possibility that evidence will be destroyed by defendants who have discovered

government surveillance of their activities often has been recognized as a sufficient exigency to justify warrantless entry." (*United States v. Edwards* (1st Cir. 1979) 602 F.2d 458, 468.)

Under circumstances analogous to those here, the United States Supreme Court has upheld the validity of a protective sweep—that is, a warrantless entry into a residence for the limited purpose of maintaining the status quo while police diligently obtain a search warrant. For example, in *Illinois v. McArthur* (2001) 531 U.S. 326 (*McArthur*), a woman asked police to stand outside her residence while she retrieved her belongings and moved out and, upon exiting the residence, she told officers that her husband hid drugs under the couch. (*Id.* at pp. 328-329.) One officer left to get a search warrant, while the other remained and told the husband that he could not reenter the residence unless accompanied by the officer. (*Id.* at p. 329.) During the two-hour wait for the search warrant, the husband reentered several times and, on each occasion, the officer stood inside the doorway, watching him. (*Ibid.*) The court upheld this temporary warrantless entry because (1) police had probable cause to believe the premises contained illegal drugs; (2) police had "good reason to fear that, unless restrained," the husband would destroy the drugs before they could return with a warrant; and (3) police did not search the residence before obtaining a warrant. (*Id.* at p. 332.) "*McArthur* [*supra*, 531 U.S. 326] plainly teaches us [that] a police officer armed with probable cause to believe a home contains evidence of a serious crime that might otherwise be destroyed may lawfully secure the home and restrict entry while waiting for an assisting officer to

diligently procure a search warrant." (*United States v. Shrum* (10th Cir. 2018) 908 F.3d 1219, 1231.)

"The emergency circumstances will vary from case to case, and the inherent necessities of the situation at the time must be scrutinized. Circumstances which have seemed relevant to courts include (1) the degree of urgency involved and the amount of time necessary to obtain a warrant [citations]; (2) reasonable belief that the contraband is about to be removed [citations]; (3) the possibility of danger to police officers guarding the site of the contraband while a search warrant is sought [citation]; (4) information indicating the possessors of the contraband are aware that the police are on their trail [citation]; and (5) the ready destructibility of the contraband and the knowledge "that efforts to dispose of narcotics and to escape are characteristic behavior of persons engaged in the narcotics traffic.'" (*In re Elizabeth G.* (2001) 88 Cal.App.4th 496, 506.)

As one commentator has explained: "[I]f the exigent circumstance being responded to is the possibility that there may be other persons within the premises who might destroy evidence, then the logical first step is a 'sweep' of those premises to see if in fact anyone else is present. If no one is found, then the exigency has ended and the police should then merely maintain control of the premises while a search warrant is obtained . . . ." (3 LaFave, *Search and Seizure* (5th ed. 2012) § 6.5(b), p. 541, fn. omitted.)

Applying these principles, California appellate courts have upheld warrantless protective sweeps after car stops. For example, in *Ferdin v. Superior Court* (1974) 36 Cal.App.3d 774 (*Ferdin*), after police made a traffic stop on a drug courier, they entered



the defendant's home to secure the residence while acquiring a search warrant. (*Id.* at pp. 778-779.) Stating that a "danger" existed that the traffic stop of the courier "would become known to [defendant] with consequent destruction of contraband," the court upheld the warrantless entry because "officers might reasonably believe that [the defendant] would become uneasy and either destroy the contraband or be on the alert to dispose of it if anyone should approach the house . . . ." (*Id.* at pp. 781-782.)

Similarly, in *People v. Freeny* (1974) 37 Cal.App.3d 20, police secured the residence of a suspected heroin dealer while obtaining a search warrant. In that case, police arrested the dealer in his car after he left the residence. (*Id.* at pp. 25-26.) Police knew that the defendant's wife was in the residence and "feared that in the period during which [officers] sought and obtained a warrant to search the house, [the wife] would learn that [the defendant] had been arrested and would destroy narcotics in the residence." (*Id.* at p. 26.) Accordingly, police entered the residence to secure it pending issuance of a search warrant. (*Ibid.*) The Court of Appeal upheld the warrantless entry because police reasonably concluded that the wife would learn of her husband's arrest and destroy evidence "while the judicial process ground out the eventual search warrant." (*Id.* at p. 33.)

*United States v. Johnson* (6th Cir. 2012) 457 Fed. Appx. 512 also involves a protective sweep after a car stop. There, police suspected large-scale drug transactions occurring at a residence and conducted traffic stops on three cars leaving the premises. Concerned that when these individuals were released from the traffic stop they "might contact individuals who may be in the home and instruct them to destroy evidence",

police forced entry into the home in a "protective sweep" that lasted "a few minutes." (*Id.* at p. 514.) Police then secured the home while waiting for a search warrant to be issued. (*Ibid.*) The Court of Appeals held that the warrantless protective sweep was lawful because (1) police had a reasonable belief that marijuana was located at the residence; (2) police reasonably believed that at least one individual was inside the property; and (3) upon being released from custody, the individuals involved in the traffic stops could contact the individuals in the house and instruct them to destroy the drugs. (*Id.* at p. 517.)

Other similar cases abound: *United States v. Ruiz-Estrada* (8th Cir. 2002) 312 F.3d 398, 404 [securing an apartment while awaiting a search warrant proper "to prevent the destruction of a suspected narcotics supply" after arrest of seller elsewhere]; *United States v. Riley* (5th Cir. 1992) 968 F.2d 422, 425-426 [warrantless entry pending issuance of search warrant lawful based on reasonable belief that occupant would soon realize something wrong when just-arrested cohort with cellular phone did not make contact and that drugs were inside and might be destroyed]; *State v. Davis* (Iowa Sup. Ct. 1986) 383 N.W.2d 524, 525-527 [entry to secure premises while waiting for search warrant for illegal drugs lawful where accomplice's arrest in neighborhood was likely to be communicated to those inside home, who might destroy drugs]; *United States v. Webster* (5th Cir. 1984) 750 F.2d 307, 326 [warrantless entry to secure premises pending search warrant justified where police feared the destruction of drug evidence because suspects were aware that police are on their trail].

In this case, based on lawfully intercepted communications, police had probable cause to believe that Sanchez was going to receive a large shipment of drugs. The courier told Sanchez he had the cocaine (coded, "tires") and wanted to meet to arrange delivery. Police established surveillance of Sanchez's residence and saw him leave and meet the courier briefly, after which the two men drove to the residence. Once there, Sanchez and the courier stood next to each other, near the passenger door of the Toyota and then entered the residence together. Police did not see contraband move from the Toyota to the house; however, a block wall and fence obstructed the officers' vision of Sanchez's hands. Fifteen minutes later, the courier left. The obvious and compelling inference from these facts is that the courier delivered drugs to Sanchez, which the two men carried into Sanchez's residence.<sup>5</sup>

Police also had a reasonable suspicion that before or after the traffic stop on the Toyota, the courier would alert Sanchez that police were on his trail. Based on intercepted communications, officers knew that Sanchez and the courier communicated with each other by cell phone. The record does not indicate the duration of the car stop, nor how long police detained the Toyota's driver. However, Officer Kittman testified, "I was fearful that the driver of the [Toyota] . . . was going to be able to call back if he was stopped by the officers. I knew that they had communication with one another, so at that point[] one half of the team froze the location, while the other half of the team continued

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<sup>5</sup> Thus, we reject Sanchez's contention that officers had only a factually unsupported "hunch" that drugs were inside the residence.

with the traffic stop." Moreover, it would take more than three hours to obtain the search warrant.<sup>6</sup> Officer Kittman had an objectively reasonable belief that in the time before a warrant could be obtained, Sanchez would learn of the car stop and destroy the narcotics. Law enforcement officers are allowed to "draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.'" (*United States v. Arvizu* (2002) 534 U.S. 266, 273.) And as a reviewing court, we are required to give "'due weight'" to these inferences. (*Ibid.*)<sup>7</sup>

Last, the protective sweep was properly limited in scope. Police only maintained the status quo while they obtained a search warrant. Officers did not open any containers, bags, or look through any closets. On the facts as found by the trial court, as a matter of law, the protective sweep was lawful. (*McArthur, supra*, 531 U.S. 326; *Ferdin, supra*, 36 Cal.App.3d 774; *Freeny, supra*, 37 Cal.App.3d 20.)

Moreover, because the protective sweep was lawful, Sanchez's admission that he received cocaine from the courier was properly included in the search warrant affidavit. Accordingly, it is unnecessary to consider Sanchez's alternative argument that because his on-scene admission should have been suppressed, there is no probable cause to support the court's issuance of the warrant.

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<sup>6</sup> We reject as factually unsupported Sanchez's argument that "[n]othing delayed the issuance of a warrant . . . ."

<sup>7</sup> The record does not support Sanchez's argument that police had no basis to suspect that contraband inside the residence would be removed or destroyed by any occupant.

It is also unnecessary to consider Sanchez's argument that the trial court erred in placing the burden of proof upon him to establish the unlawfulness of the search. As already explained, Sanchez's Mirandized statements are admissible because the People sustained *their* burden of showing the lawfulness of the warrantless protective sweep.

## II. ISSUES INVOLVING CERTAIN PROBATION CONDITIONS

### A. Additional Factual Background

Sanchez's conditions of mandatory supervision include, among others, the following: "Do not associate with any unrelated person you know to be a possessor, user, or trafficker of controlled substances." Sanchez contends this condition is unconstitutionally overbroad because it precludes him from associating with possessors and users of *lawfully* prescribed controlled substances.

Sanchez's conditions also prohibit him from associating "with any unrelated person you know to be either on probation, on parole, or a gang member." Sanchez contends this condition, which does not define "gang," is unconstitutionally vague because he has "no way of knowing who falls within the definition of a gang member."<sup>8</sup>

### B. Analysis

Courts analyze mandatory supervision conditions under standards "analogous to the conditions or parallel to those to those applied to terms of parole." (*People v.*

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<sup>8</sup> Sanchez concedes he did not object to either of these conditions in the trial court; however, he contends these issues may be raised for the first time on appeal because they are facial challenges to the constitutionality of conditions that can be resolved without examining the sentencing record. (*In re Sheena K.* (2007) 40 Cal.4th 875, 889.) The Attorney General concedes that Sanchez has not forfeited these arguments.

*Martinez* (2014) 226 Cal.App.4th 759, 763.) The standard for analyzing the validity of parole conditions is "the same standard as that developed for probation conditions." (*Id.* at p. 764.)

In the context of probation conditions, a restriction is unconstitutionally overbroad if it impinges on constitutional rights and "is not 'tailored carefully and reasonably related to the compelling state interest in reformation and rehabilitation.' [Citations.] The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant's constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement." (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153.)

Sanchez contends that the condition prohibiting him from associating with persons know to use or possess controlled substances is overbroad because it does not distinguish between lawful and unlawful use. He argues that people "from all walks of life possess and use controlled substances for which they have a lawful prescription."

Sanchez proposes that the condition be modified to state: "Do not associate with any unrelated person you know to be a possessor or user of illegally controlled substances or whom you know unlawfully traffics in controlled substances." The Attorney General, implicitly conceding that the mandatory supervision condition is intended to only prohibit Sanchez from associating with people who unlawfully use or possess controlled substances, states that he "does not object" to modifying the condition in this manner. We accept this concession and will order the condition so modified.

Sanchez also asserts that the condition of his mandatory supervision that bars him from associating with any unrelated person he knows to be a gang member is void for vagueness because it does not define "gang." He proposes that the condition be modified to incorporate the definition of "gang" in section 186.22, subdivisions (e) and (f).<sup>9</sup> Again, the Attorney General does not object to modifying the condition in this manner.

In *People v. Lopez* (1998) 66 Cal.App.4th 615 (*Lopez*), the court acknowledged that when "gang" is considered in the context of a probation condition, "it is apparent the word was intended to apply only to associations which have for their purpose the commission of crimes." (*Id.* at pp. 631-632.) However, because the definition stated in section 186.22 has withstood constitutional scrutiny for ensuring that the term only refers to the intended criminal groups, the court held that the condition should be modified to include the statutory definition. (*Id.* at p. 634.) More recently, the Second Appellate District found, in dictum in *In re Justin S.* (2001) 93 Cal.App.4th 811 no need to include a reference to the statutory definition within a probation condition prohibiting association with "gang members" because "[t]he definition is . . . fairly implied in the [probation] condition." (*Id.* at p. 816, fn. 3.)

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<sup>9</sup> Section 186.22, subdivision (f) provides: "As used in this chapter, 'criminal street gang' means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, or (31) to (33), inclusive, of subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in, or have engaged in, a pattern of criminal gang activity."

Including a more precise definition of the word "gang" in the condition better assures that Sanchez will be "unambiguously notified of the standard of conduct required of him." (*Lopez, supra*, 66 Cal.App.4th at p. 634.) Accordingly, we conclude that the gang condition should be modified to incorporate the definition contained in section 186.22, subdivisions (e) and (f).

#### DISPOSITION

The controlled substances condition of mandatory supervision is modified to read: "Do not associate with any unrelated person you know to be a possessor or user of illegally obtained controlled substances or whom you know unlawfully traffics in controlled substances." The gang condition of mandatory supervision is modified to read: "Do not associate with any unrelated person you know to be either on probation, on parole, or a gang member. For purposes of these conditions, the word 'gang' means a 'criminal street gang' as defined in Penal Code sections 186.22, subdivisions (e) and (f)."



The trial court is directed to prepare an amended order of terms and conditions of mandatory supervision that reflects these modifications.

As so modified, the judgment is affirmed.

NARES, J.

WE CONCUR:

BENKE, Acting P. J.

IRION, J.